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NOT TO BE PUBLISHED IN OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION THREE

THE PEOPLE, Plaintiff and Respondent, v. CESAR AZIEL PEDROZA, Defendant and Appellant.	G049089 (Super. Ct. No. 08HF1486) O P I N I O N

Appeal from a judgment of the Superior Court of Orange County, Lance Jensen, Judge. Affirmed in part, reversed in part, remanded for further proceedings.

Law Offices of Allen G. Weinberg and Allen G. Weinberg, under appointment by the Court of Appeal, for Defendant and Appellant.

Kamala D. Harris, Attorney General, Gerald A. Engler, Chief Assistant Attorney General, Julie L. Garland, Assistant Attorney General, Barry Carlton and Adrianne S. Denault, Deputy Attorneys General, for Plaintiff and Respondent.

* * *

Defendant Cesar Ariel Pedroza, who was 17 years old at the time of the relevant crime, was convicted of conspiracy to commit first degree murder (Pen. Code, § 182, subd. (a)(1))[1] and various other crimes. The jury also found several enhancements true, including the allegation that a gang member vicariously discharged a firearm, causing great bodily injury. (§§ 186.22, subd. (b)(1); 12022.53, subds. (d), (e)(1).) He was sentenced to 25 years to life on the conspiracy charge plus a consecutive term of 25 years to life on the great bodily injury enhancement.

Defendant raises only one substantive attack on his conviction: the trial court's purported abuse of discretion in denying his defendant's motion for mistrial after the jury heard he had previously been arrested at the scene of a different shooting. We reject that claim, concluding any resulting prejudice was purely speculative.

The rest of defendant's claims relate to his sentence. Some of them, as we shall explain, have been mooted by developments in the law that occurred while this case was pending. Defendant also raises the issue of ineffective assistance of counsel with respect to his attorney's failure to argue the relevant sentencing factors for a juvenile offender on the record prior to sentencing. We must agree with defendant that the failure to do so was both objectively below professional standards and carried a high probability of prejudice. We therefore remand the matter for a new sentencing hearing.

In all other respects, we affirm the judgment.

I

FACTS

Due to the nature of the issues on appeal, we need not delve into the facts in great depth. In summary, on July 28, 2008, defendant was 17 years old. Defendant, who was a Varrio Little Town gang member, went to a retail store with fellow gang members

[1] Subsequent statutory references are to the Penal Code.

Salvador Burciaga, Oscar Ramos, and Nestor Lopez. They purchased several items, including a distinctive hat. The presence of all four was recorded on store video.

After they left, all four got into a car, which, according to a statement later given to police by Ramos, was driven by defendant.[2] They stopped at Burciaga's house. Burciaga went inside and came back out with a shotgun. Thereafter, they went to a location in Costa Mesa.

Several people were outside, including 15-year-old Angelic P. A witness reported seeing a man with a sawed-off shotgun running toward him, asking "where you guys from?" Angelic P. was talking to a friend when she heard people screaming and running, and when she looked behind her there was someone running toward her with a shotgun, his face covered in a hoodie and wearing a hat. She tried to run but she tripped and fell, and then the man, later identified as Burciaga, shot her.

Angelic P. suffered from numerous injuries, including a permanent collapsed lung and a shotgun pellet lodged in her heart. Numerous other pellets damaged other organs, including her colon, liver and spleen. She was hospitalized for two months, and when she went home she continued to have an open stomach wound. She was scarred from her chest to her pelvis.

The police found a hat at the scene, which was recovered and traced to the hat purchased at the retail store by defendant and his companions. Approximately a week later, the police stopped a car Burciaga was driving. Defendant was also in the car. A symbol of Varrio Little Town was etched in the hood of the car.

Defendant was arrested and read his rights. During an interview with police, defendant admitted he was present but claimed he did not participate in the shooting. He said he was in the backseat with Lopez and Burciaga was in the front passenger seat.

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[2] There was conflicting testimony on this point at trial.

Defendant was eventually charged with attempted murder (§§ 664, subd. (a), 187, subd. (a)), street terrorism (§ 186.22, subd. (a)), and conspiracy to commit first degree murder (§ 182, subd. (a)(1)). Numerous enhancements were also alleged, including the allegation that a gang member vicariously discharged a firearm, causing great bodily injury. (§§ 186.22, subd. (b)(1), 12022.53, subds. (d), (e)(1).)

At the conclusion of trial, the jury convicted defendant on all three counts, and found the allegations true with respect to the enhancements.

In September 2013, the court sentenced defendant to 25 years to life on the conspiracy charge plus a consecutive term of 25 years to life on the great bodily injury enhancements, for an aggregate term of 50 years to life. The court stayed sentence on the remaining counts and struck the section 186.22, subdivision (b)(1), enhancements for sentencing purposes. Defendant now appeals.

II

DISCUSSION

A. Defendant's Request for Mistrial

During trial, David Sevilla, a gang investigator with the Costa Mesa Police Department, testified that among other reasons, he believed defendant was a gang member because he had previously been "arrested after he was leaving the scene of a shooting." In proceedings out of the jury's presence, the prosecutor stated the witness had been warned not to discuss the prior arrest and juvenile adjudication that followed. The court offered to instruct or admonish the jury, but the defense refused. The court denied the defense's request for a mistrial, but after Sevilla made this statement, the court also excluded other planned testimony about defendant's conduct with the gang. This planned testimony included specifics of the prior incident except for defendant's arrest. Defendant contends denying his motion for mistrial was error.

"'A mistrial should be granted if the court is apprised of prejudice that it judges incurable by admonition or instruction. [Citation.] Whether a particular incident is incurably prejudicial is by its nature a speculative matter, and the trial court is vested with considerable discretion in ruling on mistrial motions. [Citation.]' [Citation.]" (*People v. Collins* (2010) 49 Cal.4th 175, 198.) We review the trial court's denial of a motion for a mistrial under the deferential abuse of discretion standard. (*People v. Williams* (1997) 16 Cal.4th 153, 210.)

"'Although most cases involve prosecutorial or juror misconduct as the basis for [a mistrial] motion, a witness's volunteered statement can also provide the basis for a finding of incurable prejudice.' [Citation.]" (*People v. Williams*, *supra*, 16 Cal.4th at p. 211.) But "'[u]nder ordinary circumstances the trial court is permitted to correct an error in admitting improper evidence by ordering it stricken from the record and admonishing the jury to disregard it, and the jury is presumed to obey the instruction. [Citations.]'" (*People v. Gurrola* (1963) 218 Cal.App.2d 349, 357.) A motion for a mistrial should be granted only when "'a party's chances of receiving a fair trial have been irreparably damaged.' [Citation.]" (*People v. Welch* (1999) 20 Cal.4th 701, 749.)

Defendant characterizes Sevilla's testimony as "prior criminality" and cites cases where such testimony was found to be so prejudicial that reversal was required. He relies heavily on *People v. Hopkins* (1992) 10 Cal.App.4th 1699. But the facts in *Hopkins* were significantly different. In that case, the jury heard *repeated* testimony about a *conviction* for a violent offense (*id.* at pp. 1701-1702); here they heard only a *single* reference to the fact the defendant was *arrested* leaving the scene of the shooting.

Defendant argues the statement "buttressed" the prosecution's case, but that strikes us as speculative. This is particularly true given the witness's misstatement resulted in other, more detailed evidence about the incident that led to defendant's arrest being excluded. Had the witness not made the statement about the earlier arrest, the jury would have heard that defendant was in a car with members of two other gangs when

they drove into a rival gang's territory. The rival gang members fired shots at the car. When the police stopped the car a short distance from the scene of the shooting, defendant admitted to being a member of the Varrio Little Town gang.

Accordingly, we cannot conclude the reference to an arrest at the scene of a shooting, without detail, was more inherently prejudicial than hearing the details of that shooting without the arrest. Therefore, defendant has not met the high bar of establishing an abuse of discretion with respect to his request for a mistrial.

B. Ineffective Assistance of Counsel

"The standards for ineffective assistance of counsel claims are well established. 'We presume that counsel rendered adequate assistance and exercised reasonable professional judgment in making significant trial decisions.' [Citation.] To establish a meritorious claim of ineffective assistance, defendant 'must establish either: (1) As a result of counsel's performance, the prosecution's case was not subjected to meaningful adversarial testing, in which case there is a presumption that the result is unreliable and prejudice need not be affirmatively shown [citations] or (2) counsel's performance fell below an objective standard of reasonableness under prevailing professional norms, and there is a reasonable probability that, but for counsel's unprofessional errors and/or omissions, the trial would have resulted in a more favorable outcome. [Citations.]' [Citation.]" (*People v. Prieto* (2003) 30 Cal.4th 226, 261; see also *Strickland v. Washington* (1984) 466 U.S. 668, 694.)

Defendant's specific complaint is that counsel failed to raise three points at sentencing – defendant's age at the time of the crime, objecting to the sentence the court imposed, and failing to argue the sentencing factors under *Miller v. Alabama* (2012) 567 U.S. ____ [132 S. Ct. 2455] (*Miller*). The record, specifically the probation report, does reflect the defendant's age. And it is not inherently ineffective to fail to object to a sentence the court has imposed.

We are less sanguine, however, about the lack of any argument in the record by defense counsel Steven Afghani about *Miller*. *Miller* reflected a sea change in sentencing for juvenile offenders, rejecting mandatory life sentences without the possibility of parole. (*Miller*, *supra*, 567 U.S. ____ [132 S.Ct. at p. 2460].) It extended prior case law, including *Graham v. Florida* (2010) 560 U.S. 48, which forbade life without parole sentences for juvenile offenders for nonhomicide crimes, and *Roper v. Simmons* (2005) 543 U.S. 551, which held the death penalty could not be imposed on juvenile offenders for any crime. Additionally, *Miller* also clarified the criteria trial courts must use when sentencing juvenile offenders to lengthy terms.

This developing case law has focused on the inherent immaturity and lesser culpability of youth as a key factor. "The differences between juvenile and adult offenders are too marked and well understood to risk allowing a youthful person to receive the death penalty despite insufficient culpability. An unacceptable likelihood exists that the brutality or cold-blooded nature of any particular crime would overpower mitigating arguments based on youth as a matter of course, even where the juvenile offender's objective immaturity, vulnerability, and lack of true depravity should require a sentence less severe than death." (*Roper v. Simmons*, *supra*, 543 U.S. at pp. 572-573.) In *Graham v. Florida*, *supra*, 560 U.S. at page 68, the court stated: "Juveniles are more capable of change than are adults, and their actions are less likely to be evidence of 'irretrievably depraved character' than are the actions of adults. [Citation.]" With respect to cases where the juvenile offender might be sentenced to life without parole but did not actually commit the murder, the court "recognized that defendants who do not kill, intend to kill, or foresee that life will be taken are categorically less deserving of the most serious forms of punishment than are murderers," and so "[i]t follows that, when compared to an adult murderer, a juvenile offender who did not kill or intend to kill has a twice diminished moral culpability." (*Id.* at p. 69.)

Miller, which abolished mandatory life without parole sentences for juvenile offenders, held "Mandatory life without parole for a juvenile precludes consideration of his chronological age and its hallmark features – among them, immaturity, impetuosity, and failure to appreciate risks and consequences. It prevents taking into account the family and home environment that surrounds him – and from which he cannot usually extricate himself – no matter how brutal or dysfunctional. It neglects the circumstances of the homicide offense, including the extent of his participation in the conduct and the way familial and peer pressures may have affected him. Indeed, it ignores that he might have been charged and convicted of a lesser offense if not for incompetencies associated with youth – for example, his inability to deal with police officers or prosecutors (including on a plea agreement) or his incapacity to assist his own attorneys. [Citations.] And finally, this mandatory punishment disregards the possibility of rehabilitation even when the circumstances most suggest it." (*Miller*, *supra*, 567 U.S. ___ [132 S.Ct. at p. 2468].)

Thus, *Miller* requires "that a sentencer have the ability to consider the" "distinctive attributes of youth" and how those attributes "diminish the penological justifications for imposing the harshest sentences on juvenile offenders." (*Miller*, *supra*, 567 U.S. __ [132 S.Ct. at pp. 2465, 1267].)[3]

Although the prosecution had filed a sentencing brief, the defense did not. While the record indicates the court, at the sentencing hearing, conducted an informal discussion with counsel in chambers before taking the bench to formally impose sentence, there were no arguments in court. Defense counsel stated he believed they had

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[3] Not long after *Miller* was decided, the California Supreme Court held that the prohibition on life without parole sentences for all juvenile nonhomicide offenders established in *Graham v. Florida*, *supra*, 560 U.S. 48, also precluded sentences that were "the functional equivalent of a life without parole sentence." (*People v. Caballero* (2012) 55 Cal.4th 262, 268.)

"covered all the bas[e]s in chambers." After confirming that defendant was waiving his right to make a statement, the court went on to impose sentence. There is nothing in the record to reflect that age was discussed, or that the *Miller* factors were considered by the court. The Attorney General argues we should presume the court considered all relevant law, but our decision not to engage in such a presumption is required here by what happened after the sentencing hearing.

Defendant was sentenced on September 27, 2013. On January 17, 2014, the attorneys appeared in court again at defense counsel's request. Defense counsel stated it had been brought to his attention by appellate counsel that he "may have been amiss in [not] mentioning to the court during the sentencing that [defendant] was a minor at the time he was charged with the crimes . . . in this case." He then "invit[ed] the court to recall the matter" and have [the defendant] brought" to court for sentencing purposes. The court agreed, and a date was set.

The court lost jurisdiction to recall the sentence on its own motion on or about January 17, 2014, 120 days after commitment. (Former § 1170, subd. (d)(1).) The 120-day period is jurisdictional. (*People v. Lockridge* (1993) 12 Cal.App.4th 1752, 1757.) Former section 1170, subdivision (d)(1), is an exception to the general rule that filing a notice of appeal deprives the trial court of jurisdiction. (*Ibid.*)

The hearing the court had agreed to in January was held on August 1, 2014. Defense counsel did not offer any substantive argument before the court began discussing the case. The court addressed defendant's status as a minor and said an issue often raised at sentencing was cruel and unusual punishment. It noted the last time the court had dealt with the issue, the relevant case law was *People v. Abundio* (2013) 221 Cal.App.4th 1211.[4] The court stated it had considered "many factors" in whether the sentence it imposed here would be cruel and unusual, mentioning defendant's near-adult age of 17

[4] While it is a cruel and unusual punishment case, *Abundio* is not a juvenile case.

and a half years old. The court did not recall reading or hearing anything that would indicate defendant demonstrated "unusual immaturity or any psychological or mental challenges." The probation report had noted defendant's history of juvenile offenses and pattern of increasing gang activity. The court indicated it had considered statutory aggravating factors.

Thus, the court stated, "the punishment is not so disproportionate to the crime and defendant's individual culpability such that it shocks the conscious and offends the fundamental notions of human dignity. [¶] Therefore, under the totality of the circumstances and taking into consideration the particularized facts of the case and the defendant as an individual, the court . . . would have declined at the time of sentencing and continues to decline at this time to exercise its discretion to strike any finding to therefore reduce his current sentence of 50 years to life." The court asked defense counsel if he wished to supplement the record further, and counsel declined.

We note first that the court's comments after it lost jurisdiction are of no legal import, but nonetheless, they are demonstrative of the fundamental problem in this case. Even when given two additional opportunities to put the *Miller* factors before the court, defense counsel failed to do so. The court's colloquy in August does not reflect the requirements of *Miller*, which goes beyond a typical cruel and unusual punishment analysis. It requires the sentencing court to consider how juveniles are different, and to take those differences into account. The only consideration the court mentioned was that defendant did not demonstrate "unusual immaturity or any psychological or mental challenges." But the court did not consider the *usual* immaturity of juveniles, which was really the heart of *Miller's* holding.

The blame for the court's failure to consider *Miller* can be placed squarely at counsel's feet. Even when given two additional opportunities to discuss the relevant case law with the court, counsel failed to do so. He also failed to file a sentencing brief that would have assisted the court in understanding and applying this substantially

changed area of the law. This was objectively unreasonable, particularly given the long sentence his client was facing. "[A] defense attorney who fails to adequately understand the available sentencing alternatives, promote their proper application, or pursue the most advantageous disposition for his client" may be determined to be ineffective. (*People v. Scott* (1994) 9 Cal.4th 331, 351.)

As to prejudice, although there was no guarantee the court would have made a different decision, there is, at least, a reasonable probability the court would have looked at the matter differently if it considered the appropriate criteria. Indeed, Burciaga, the shooter in this case, was sentenced to 40 years to life.[5] Thus, we conclude a finding of ineffective assistance of counsel is required in this case, and defendant, accordingly, is entitled to a new sentencing hearing.

While this appeal was pending, the California Supreme Court decided *People v. Franklin* (2016) 63 Cal.4th 261 (*Franklin*). *Franklin* concluded the procedures set forth in sections 3051 and 4801, which require a parole hearing during a juvenile offender's 25th year of incarceration, moots any cruel and unusual punishment challenge to a 50-year-to-life sentence. (*Id.* at p. 268.) *Franklin* makes clear that juvenile offenders are entitled to make a record of mitigating evidence tied to their youth at the sentencing hearing. (*Id.* at p. 269.) These factors include a defendant's "cognitive ability, character, and social and family background at the time of the offense." (*Ibid.*)

We reject the prosecution's contention, however, that *Franklin* forecloses a new sentencing hearing in this case. The simple reason is that ineffective assistance of counsel was not an issue in *Franklin*, and therefore the court never considered it. "'Opinions are not authority for issues they do not consider. [Citations.]' [Citation.]" (*Melchor Investment Co. v. Rolm Systems* (1992) 3 Cal.App.4th 587, 591; see also *V&P Trading Co., Inc. v. United Charter, LLC* (2012) 212 Cal.App.4th 126, 134.)

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[5] Defendant requests we take judicial notice of the file in Burciaga's appeal. The request is granted pursuant to Evidence Code sections 452 and 459.

We do not interpret the Supreme Court's holding in *Franklin* to mean that an initial sentencing hearing is acceptable even if counsel's performance was so deficient that it violated the Sixth Amendment right to counsel. Given the importance the Supreme Court placed on the *Miller* factors, including remanding the case to create a more thorough record for the 25-year parole hearing, we find it very unlikely the Supreme Court intended to imply that the failure to argue these issues at sentencing could never be prejudicial in the ineffective assistance of counsel context. That is precisely what happened here. Defendant is entitled to a new sentencing hearing where all of the *Miller* factors can be properly considered.

C. Sentencing Upon Remand

In a supplemental letter brief, defendant asks for a new attorney on remand. As defense counsel at trial was retained, rather than appointed, he may, of course, discharge trial counsel and either retain new counsel or seek appointment of the public defender. As long as he does so in a timely manner, it is difficult to envision any prejudice to the prosecution. (See *People v. Ortiz* (1990) 51 Cal.3d 975, 983-984.)

Two other issues were raised by defendant on appeal relating to the gang enhancements at sentencing. The first relates to a correction of the abstract of judgment to reflect the court's oral pronouncement, which is now moot. The second was whether the enhancement pursuant to section 186.22, subdivision (b)(1), was properly stayed or stricken. This, too, appears to be an oral pronouncement versus minute order question; the trial court stated at sentencing it could not impose that enhancement, but the abstract appears to reflect a stay. This, too, is now moot given the new sentencing hearing.

Defendant also requests we remand this case to a new judge for resentencing. The Attorney General does not outright oppose this idea, but stated this case does not present circumstances that would justify remand to a new judge. We

conclude it is in the best interests of *both* parties, given the history of this case, to exercise our discretion to order resentencing before a new judge.

III

DISPOSITION

The matter is remanded for a new sentencing hearing. In all other respects, the judgment is affirmed. The presiding judge is ordered to assign this case to a new judge on remand.

The clerk of the court is directed to send a copy of this opinion to the State Bar of California and to attorney Steven Afghani. (Bus. & Prof. Code, § 6086.7, subds. (a)(2), (b).)

MOORE, J.

WE CONCUR:

BEDSWORTH, ACTING P. J.

FYBEL, J.